(2)

No. 91-594

In The

Supreme Court of the United States

October Term, 1991

AMERICAN NATIONAL RED CROSS,

Petitioner,

vs.

S.G. and A.E.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 28 U.S.C. § 1447 (d) (which makes unreviewable District Court orders remanding actions to the state court from which they were removed) precludes review of this action which has been remanded to the state court.

2. Whether the American National Red Cross' petition for certiorari should be denied because:

(a) The substantive issue presented is not ripe for review;

(b) The judgment of the Court of Appeals was issued on interlocutory review;

(c) The basis for federal jurisdiction does not appear on the face of the complaint;

(d) The issue appealed is not of sufficient importance to warrant certiorari review; and

(e) The decision of the Court of Appeals is correct.

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents, S.G. and A.E., respectfully request that this Court deny the petition for writ of certiorari seeking review of the First Circuit's opinion in this case. That opinion is reported at 938 F.2d 1494 (1st Cir. 1991).

STATEMENT OF FACTS

The respondent, S.G., in August, 1984 underwent a hysterectomy at Concord Hospital in Concord, New Hampshire. During this operation a blood transfusion was required. This blood was contaminated with human immunodeficiency virus (HIV) and as a result S.G. now suffers from AIDS.

Upon discovering that she had this disease S.G. and her husband, A.E., commenced two actions in Merrimack County Superior Court (state court), one against Kenneth L. McKinney (the physician who performed the operation) and the other against U.S. Surgical Corp. (the company that manufactured and sold the surgical stapler used by Dr. McKinney during the operation). These suits were commenced in April and August of 1988 in the state court and were later joined (Appendix A, 3a, 6a). As discovery progressed, it became evident that a third party, American National Red Cross, was responsible for furnishing the tainted blood. On March 2, 1990, the respondents commenced suit against Red Cross in Merrimack County Superior Court (Appendix A, 1a) and this writ was accompanied by a motion to consolidate the action with the two pending suits against Dr. McKinney and U.S. Surgical Corp.

Before the Superior Court could rule on this motion to consolidate, Red Cross removed the action against it to United States District Court for the District of New Hampshire on two grounds, (a) that the Red Cross Charter, 36 U.S.C. § 2, conferred on federal district courts original jurisdiction over actions involving the Red Cross, and (b) that the parties are citizens of different states and that federal jurisdiction is appropriate under 28 U.S.C. § 1332(a). Respondents filed a motion to join Dr. McKinney and U.S. Surgical Corp. and remand the entire action to Merrimack County Superior Court pursuant to 28 U.S.C. § 1447(e). Relying principally on *Osborn v. Bank of the United States*, 22 U.S. (9

Wheat.) 738 (1824), the District Court ruled that legal actions to which the Red Cross is a party fall within the exclusive (original) jurisdiction of the federal courts. The court also ruled that but for this issue, it would grant plaintiff's motion to join and remand the case to the state court pursuant to Rule 20 of the Federal Rules of Civil Procedure and 28 U.S.C. § 1447(d).

Upon interlocutory review, the First Circuit Court of Appeals reversed, finding that the Red Cross Charter did not confer original federal jurisdiction. *See S.G. and A.E. v. American National Red Cross*, 938 F.2d 1494 (1st Cir. July 24, 1991). On August 13, 1991 the First Circuit denied petitioner's motion for a stay of the mandate, and remanded the action to the District Court. On September 24, 1991, the District Court reaffirmed its prior order joining the two non-diverse defendants (Dr. McKinney and United States Surgical Corporation) and remanded the case to Merrimack County Superior Court (Appendix C, 15a).

Following that remand Red Cross also petitioned this Court for a stay of the mandate of the Court of Appeals which was denied by Justice Souter on September 30, 1991. Presently before this Court is the Red Cross petition for writ of certiorari which seeks another determination of whether 36 U.S.C. § 2 vests federal courts with original jurisdiction over actions involving the Red Cross.

REASONS FOR DENYING THE WRIT

I.

THE DISTRICT COURT'S ORDER REMANDING THIS ACTION TO STATE COURT IS UNREVIEWABLE.

28 U.S.C. § 1447(d) provides in relevant part that, "An order remanding a case to the State court from which it was removed

is not reviewable on appeal or otherwise. . . . "[1] *See Thermtron Prods. Inc. v. Hermandorfer,* 423 U.S. 336, 343 (1976) (District Court's decision to remand action that was removed "improvidently and without jurisdiction" is unreviewable); *Seedman v. U.S. Dist. Ct. for Cent. Dist. of California,* 837 F.2d 413 (9th Cir. 1988) (per curiam) (remand order returns case to state courts, and federal court has no power to retrieve it). *See generally,* 14A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3740 (2d ed. 1985 and Supp. 1991); 12 J. Moore, H. Bendix & B. Ringle, *Moore's Federal Practice* ¶ 507.01 (2d ed. 1990). Such orders were made unreviewable primarily because Congress intended to bar prolonged litigation over questions of the District Court's jurisdiction. *United States v. Rice,* 327 U.S. 742, 751 (1946) ("Congress, by the adoption of these provisions, as thus construed, established the policy of not permitting interruption of the litigation of the merits of a removal cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed."). *See also, Metropolitan Casualty Ins. Co. v. Stevens,* 312 U.S. 563, 568-569 (1941); *In re La Providencia Development Corporation,* 406 F.2d 251 (1st Cir. 1969); *In re Bear River Drainage District,* 267 F.2d 849, 851 (10th Cir. 1959). This concern is reflected in Justice Scalia's recent observation that "[n]othing is more wasteful than litigation about where to litigate." *Bowen v. Massachusetts,* 487 U.S. 879, 930 (1988) (dissenting opinion).

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1. Prior to 1875, a remand order was regarded as a nonfinal order reviewable by mandamus but not by appeal. In 1875, Congress provided for review "by the Supreme Court on writ of error or appeal, as the case may be." Twelve years later, Congress barred any such review. *Georgia v. Rachel,* 384 U.S. 780, 786 n.6 (1966). Until its amendment in 1964, the statutory bar prohibited review of a remand order "on appeal or otherwise" in cases removed pursuant to any statute. With an exception not pertinent to the instant case, the modern version of the statutory bar, 28 U.S.C. § 1447(d), absolutely prohibits appellate review of remand orders.

Although ignoring the issue in its petition for certiorari, the Red Cross has previously conceded the validity of this argument. In support of its motion in District Court for a stay of proceedings pending appeal, the Red Cross asserted:

> Because this Court has previously announced how it would resolve the joinder and diversity issues (Order of June 19, 1990 at 4, modifying Order of May 24, 1991), the Red Cross is concerned that without a stay of proceedings, this Court may immediately resolve the diversity issue and remand the action to state court. *Such a remand to state court would foreclose the Red Cross from appealing the charter issue to the United States Supreme Court, because an order to remand is unappealable under the circumstances of this case. See 28 U.S.C. § 1447(d).*

(Emphasis added) (Appendix B, 9a, 10a). The District Court did resolve the diversity and joinder issues and it thereafter issued an order remanding the case to state court. As the Red Cross recognized, it is now precluded by operation of 28 U.S.C. § 1447(d) from pursuing the instant appeal.

The concerns announced by Congress in enacting § 1447(d) and by Justice Scalia in the *Bowen* case are well illustrated by the Red Cross' evasive maneuvering in the instant action. Almost two years after this action was initiated, the Red Cross continues to avoid trial by repeatedly challenging the state court's ability to adjudicate a matter involving allegations of common law negligence. There is no question that the related actions against Dr. McKinney and United States Surgical will be decided in the Merrimack County Superior Court. There is no reason to believe that the Superior Court would not fairly adjudicate respondents' claims against the Red Cross. There is also no good reason for

the Red Cross to fear state court jurisdiction.

The Red Cross' attempt to obtain review of the District Court's unreviewable order should be summarily rejected.

II.

THE ISSUE OF FEDERAL JURISDICTION IS NOT YET RIPE FOR DECISION BY THIS COURT.

Rule 10 of the Rules of the Supreme Court states that review on writ of certiorari is available to resolve a conflict between decisions rendered by different courts of appeals. As Rule 10.1 makes clear, however, such review is not a matter of right but of judicial discretion.

Until the last six months, the jurisdictional issue raised by the Red Cross had only been considered by federal district courts. Approximately half of those courts concluded that federal courts have original jurisdiction over actions involving the Red Cross. Only two courts of appeals have as yet addressed the issue.

In *Kaiser v. Memorial Blood Center of Minneapolis*, 938 F.2d 90 (8th Cir. 1991), the Eighth Circuit ruled that the "sue and be sued" clause in the Red Cross charter creates original federal jurisdiction. The *Kaiser* court's discussion of the issue, however, is exceedingly brief. The two paragraphs devoted to this issue contain very little exposition of the reasoning behind its ruling. Two recent federal district courts that have had occasion to address the jurisdictional question presented have expressly found *Kaiser* unpersuasive. *See Walker v. American National Red Cross, et al.*, No. 91-0749, Slip Op. (D.D.C. May 10, 1991) (Revercomb, J.) (holding that the Red Cross' charter does not create original federal jurisdiction: "The opinion of the United States Court of Appeals for the Eighth Circuit, *Kaiser v. Memorial Blood Center,*

supra, which does not state the reasons for its conclusions, does not persuade this court otherwise.") (Appendix D, 21a) and *Luckett v. Harris Hospital-Fort Worth*, 764 F. Supp. 436 (N.D. Tex. 1991) (finding *Kaiser* unpersuasive and noting that the *Kaiser* order was primarily concerned with certifying questions to the Minnesota Supreme Court).

In contrast to the *Kaiser* decision, the First Circuit has given the jurisdictional issue presented a searching and painstaking analysis, and has fully set forth the reasons for and the reasoning behind, its conclusions. *See S.G. and A.E.*, 938 F.2d 1494 (1st Cir. 1991). It may well be that the First Circuit decision, once it has had full circulation and analysis will lead to greater uniformity in the decisions which follow so that the present conflict will gradually resolve itself.

Even if the First Circuit decision does not gain wide acceptance, there is another compelling reason why consideration of the issue at this time is premature. This Court has often followed the policy that it will allow the lower courts an opportunity for further study and analysis before offering a resolution to a conflict between Circuits. *See McCray v. New York*, 461 U.S. 961, 963 (1983) and *Gilliard v. Mississippi*, 464 U.S. 867 (1983) (Marshall J. dissenting). This approach is particularly appropriate in this case for two reasons. First, only one Circuit Court decision has given this issue searching and definitive analysis. Second, as pointed out by the Red Cross in its petition for certiorari, the Fifth Circuit has recently accepted the issue on interlocutory appeal in *Doe v. Kerwood*, No. 90-9101, Slip Op. (July 19, 1991). The Fifth Circuit decision may indicate a trend toward uniformity on this issue. At the very least, the Fifth Circuit's decision should provide this Court with considerably greater illumination and exposition of the issue than it now has.

III.

SINCE THE JUDGMENT IN THE COURT BELOW IS INTERLOCUTORY, THIS COURT SHOULD AWAIT A FINAL DISPOSITION OF THE CASE BEFORE EXERCISING JURISDICTION.

This Court has long followed a policy of not entertaining petitions for certiorari in interlocutory appeals unless the case presents some extraordinary issue. In *American Construction Co. v. Jacksonville, T. & K.R. Co.*, 184 U.S. 372, 384 (1893), this Court stated that it "should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." In a later case, *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916), this Court stated that certiorari jurisdiction is "to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision . . . . And except in extraordinary cases, the writ is not issued until final decree." The lack of finality of the judgment below, without more, may furnish sufficient ground for denial of the application. *See Brotherhood of Locomotive Firemen v. Bangor & Aroostock R. Co.*, 389 U.S. 327, 328 (1967) and *Estelle v. Gamble*, 429 U.S. 97, 115 (1976) (Stevens, J. dissenting) (referring to "the Court's normal practice of denying interlocutory review").

Rather than "prevent[ing] extraordinary inconvenience and embarrassment" in the conduct of this case, the granting of this petition will inflict extraordinary harm on the respondents. Respondent S.G. is dying of AIDS. She should not be required to wait indefinitely for a resolution of her suit against the Red Cross. She commenced her suit in April, 1990 and for the last year and a half the parties, at the instance of the Red Cross, have

been litigating about where to litigate, rather than litigating the merits of her case. The granting of this petition will probably delay the resolution of this jurisdictional issue for another year. S.G. deserves a better fate from the legal system than a two-and-a-half year delay of her case, while Red Cross wrangles over the proper forum for her case.

The prejudice to the respondents is not difficult to show. Because of the jurisdictional dispute, discovery is now on hold and the respondents have been unable to obtain the identity of the donor, whether he is still living and whether he would have given blood had the Red Cross followed proper donor screening procedures. Further delay will make it difficult, if not impossible, to get the answers to these and many other vital and pertinent questions.

In addition, it is difficult to understand why Red Cross will experience extraordinary inconvenience or embarrassment if the interlocutory petition is denied. The case will simply proceed to trial in state court along with the other two defendants. State courts have presided over approximately twenty similar cases. *See* Petition for Certiorari, pp. 11-12 (and cases cited therein). There is no claim by the Red Cross that it did not receive fair treatment in those cases. To the contrary, justice may have been better served since all concerned parties were before the same forum at the same time.

Finally, it is entirely possible that if this case proceeds to trial on the merits in state court a result may be produced (such as settlement) which will make it unnecessary for this Court to address the issue.

IV.

THIS COURT SHOULD DENY CERTIORARI BECAUSE THE BASIS OF RED CROSS' CLAIM OF FEDERAL JURISDICTION, 36 U.S.C. § 2, DOES NOT APPEAR ON THE FACE OF THE RESPONDENTS' WELL PLEADED COMPLAINT.

The claim of the respondents against Red Cross arises out of the common law of the State of New Hampshire. Their complaint alleges that the Red Cross negligently failed to properly screen blood donors and as a consequence the respondent, S.G., became infected with the HIV virus, and now suffers from AIDS. There is no mention in the respondents' complaint of the Red Cross Charter or 36 U.S.C. § 2.

Red Cross claims federal jurisdiction under the provision in its charter (36 U.S.C. § 2) that provides that the Red Cross shall have "the power to sue and be sued in courts of law and equity, state or federal, within the jurisdiction of the United States." This is a congressionally enacted statute and Red Cross contends that it falls within the purview of 28 U.S.C. § 1331 which confers on district courts "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

However the presence or absence of federal question jurisdiction is governed by the "well pleaded complaint" rule. Whether a case is one arising under federal law in the sense of the jurisdictional statute must be determined by what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose. *Taylor v. Anderson,* 234 U.S. 74 (1914), *Oklahoma Tax Commission v. Graham,* 489 U.S. 838 (1989). Moreover "to bring a case within the statute, a right or immunity created by

the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action." *Gully v. First Nat. Bank*, 299 U.S. 109, 112 (1936). The vast majority of cases which fall under federal question jurisdiction are covered by Justice Holmes' statement that a "suit arises under the law that creates the cause of action." *American Well Works Co. v. Layne S. Bowler Co.*, 241 U.S. 257, 260 (1916).

In the suit of S.G. and A.E. against Red Cross, the "sue and be sued clause" in the Red Cross Charter is not an essential element of the respondents' state law claim, and there is no reason or justification for it to appear in their complaint. Therefore this Court should deny federal question jurisdiction on the basis of this very salutary rule.[2] This is a case arising under state law, and it is quite appropriate that a state forum should resolve it. As the court said in *Doe v. American Red Cross*, 727 F. Supp. 186, 192 (E.D. Pa. 1989):

> The thrust of Congressional policy since 1925 has been to limit federal-question jurisdiction of cases not involving government instrumentalities to those situations in which the governing law is federal. The policy is a sound one. It respects the balance of authority between state and federal courts which is an essential ingredient of the federal system.

See also, Luckett v. Harris Hospital-Fort Worth, supra at 441.

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2. This issue was raised in the lower court but not addressed by its opinion because its ruling on the charter issue disposed of the case. *S.G. v. American National Red Cross, supra* at 1496.

V.

THE ISSUE RAISED BY RED CROSS IS NOT OF SUFFICIENT IMPORTANCE TO GRANT CERTIORARI.

Rule 10.1 of the Supreme Court Rules provides that "[a] petition for a writ of certiorari will be granted only when there are special and important reasons therefor." In *Rice v. Sioux City Cemetery,* 349 U.S. 70, 74 (1954) this Court defined in a general way the phrase "special and important".

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. . . . "Special and important reasons" imply a reach beyond the academic or the episodic.

No doubt the issue presented by Red Cross has academic appeal as it raises the question of whether a decision rendered by Chief Justice Marshall in 1824 should be used to determine the meaning of a statute enacted in 1947. However this issue is much more important to the Red Cross, and to the parties who have claims against it, than to the general public.

Whether the cases — now totalling about 40 — are tried in federal court or state court, they will eventually proceed to judgment, and presumably justice will be done. Citizens of the State of New Hampshire will sit on this case whether it is tried in federal or state court, and it is difficult to perceive how Red Cross will suffer more bias in state court than federal court. (Compare the prejudice to the plaintiffs of having to try their case twice with the possibility of inconsistent verdicts since all

defendants will not be present in either forum.) Each forum is equally competent to dispose of the issues in this case.

Red Cross suggests that it will promote uniformity to have certain federal questions—such as whether it can be subjected to a jury trial or punitive damages — determined in a federal court. However, this Court has frequently recognized that state courts are quite competent to entertain federal claims and litigation over federal rights. *See Gulf Offshore Co. v. Mobil Oil Corp,* 453 U.S. 473, 477-478 (1981); *Rose v. Lundy,* 466 U.S. 509, 518 (1982); *Middlesex Ethics Comm. v. Garden State Bar Assn.*, 457 U.S. 423, 437 (1982). As for uniformity, if the question is an easy one, it is likely that uniformity will be achieved whether a federal or state forum decides it; if it is a difficult one, as in this case, the courts will disagree, whether the issue is decided exclusively in a federal or state forum, or in both forums.

Red Cross' argument also ignores the fact that these claims arise under state tort law rather than federal law, and uniformity under differing state tort systems may be impossible to achieve. As the First Circuit observed, "We note, however, that a grant of original federal jurisdiction over cases involving the Red Cross would not lead to increased uniformity in the determination of that organization's liability in HIV cases. The tort law of the forum state would provide the rule of decision for the case, whether it is brought in state or federal court." *S.G. v. American Nat. Red Cross, supra at* 1501.

Red Cross also suggests that a federal forum is necessary to insulate it from "local or regional needs or prejudices" which may exert undue pressure on it. While it is possible such needs and pressures exist, it is also likely that the motives of Red Cross in seeking a federal forum are more mundane and tactical than the achievement of uniformity and insulation from local prejudice. In almost all of the suits against Red Cross, if not all, there are

multiple defendants. When Red Cross removes a case to federal court, the other defendants are often left behind in state court, thereby forcing the plaintiff to try his case twice in two different forums. This puts the Red Cross in a position to cast blame on the absent defendants when the cases are tried in federal court.

Red Cross has attempted to broaden the issue to include the charters of the Department of Housing and Urban Development (12 U.S.C. § 1702), the Pension Benefit Guarantee Corporation (29 U.S.C. § 1302) and the Federal National Mortgage Association and Government National Mortgage Association (12 U.S.C. § 1723a(a)), each of which has a "sue and be sued" clause similar to, but not the same as the Red Cross. It should be noted that this language in each charter falls within an enumeration of the powers of the corporation; thus it is more likely a grant of capacity to litigate than a grant of jurisdiction. *Cf.* Federal Rules of Civil Procedure 17(b). Also, it is significant that each of these charters relates to a corporation under the control of the United States or an agency of the United States. Under 28 U.S.C. § 1349 the district courts are granted jurisdiction over corporations under the control of the United States, and under 28 U.S.C. § 1345 district courts are granted jurisdiction over agencies of the United States which commence civil actions. The Red Cross, in contrast, is a private charitable corporation which is neither controlled by nor an agency of the United States. *See Walton v. Howard University*, 683 F. Supp 826, 831-2 (D.D.C. 1987). Therefore, Red Cross' reliance on these charters is clearly misplaced. It is unlikely that the decision of the First Circuit in this case had any effect whatever on these substantially distinct charters, as Congress had already granted each corporation a separate basis of jurisdiction under Sections 1345 and 1349. In short, Red Cross' Charter should be analyzed in the light of its own language and legislative history, rather than resorting to charters of federal agencies and instrumentalities quite different in nature and purpose.

Finally the respondents submit that the most appropriate solution to the problem confronting the Red Cross is a legislative one. If Congress intended to confer federal jurisdiction over suits against the Red Cross, then the Charter was ineptly drafted. As the First Circuit observed, "[If] modern demands now require conferring federal jurisdiction over Red Cross cases, the Congress has plenary power to act." Rather than seek a judicial solution to its problem, with all the attendant expenditure of scarce judicial resources, Red Cross should present its problem without further delay to Congress. In the past Congress has often demonstrated its capacity to cut such Gordian Knots.

VI.

THE DECISION OF THE COURT OF APPEALS IS CORRECT.

Red Cross asserts that its charter (36 U.S.C. § 2) creates original federal jurisdiction which entitles Red Cross to remove to federal court actions to which it is a party. Section 2 in pertinent part reads as follows:

> 2 Name of Corporation; Powers
>
> The name of the corporation shall be "The American National Red Cross" and by that name it shall have perpetual succession, *with the power to sue and be sued in courts of law and equity, State and Federal within the jurisdiction of the United States.*

(Emphasis added).

As stated above, the district courts have about evenly divided over whether this clause is a special grant of federal jurisdiction,

allowing Red Cross access to federal court in all cases. The reason for this split is obvious; the charter does not clearly and unambiguously grant federal jurisdiction to the Red Cross. Federal jurisdiction can only be found by implication and by looking at other corporate charters. Courts which have ruled against Red Cross have interpreted the "sue and be sued" clause as a grant of capacity to litigate, since it appears in an enumeration of corporate powers. These courts have reasoned that if Congress wishes to directly confer jurisdiction it usually does so expressly in a separate clause.

Red Cross acknowledges the general rule that a sue and be sued clause does not normally confer jurisdiction; however, Red Cross argues that an exception to this rule exists where Congress has specifically referred to capacity to sue and be sued *in the federal courts.*

In particular, Red Cross relies on the case of *Osborn v. Bank of the United States,* 22 U.S. (9 Wheat.) 738 (1824) where the Supreme Court ruled that the bank's charter, which allowed it to "sue and be sued . . . in all courts having competent jurisdiction, and in any Circuit Court of the United States" was a congressional grant of federal jurisdiction in all cases to which the Bank was a party. The First Circuit noted in its decision below that the language of the bank's charter was different from that of Red Cross and could legitimately be construed to grant original federal jurisdiction whereas the Red Cross Charter treats state and federal courts in a parallel fashion, and on the basis of its language cannot be deemed to have expanded the jurisdiction of federal courts. *S.G. v. American Nat. Red Cross, supra* at 1498.

Attempting to discern congressional intent in 1947 from the language used in a bank charter in 1824 is open to serious question. As one court commented, "[Osborn] interpreted a different federal charter, a charter from a different era, with a different purpose,

set in a different context." *Anonymous Blood Recipient v. W. Beaumont Hosp.*, 721 F. Supp. 139, 143 (E.D. Mich. 1989).

Since *Osborn* only one case has arisen in which this Court has construed similar language. *D'Oench, Duhme & Co. v. Federal Deposit Insurance Corp.*, 315 U.S. 447 (1942). In that case this Court construed 17 U.S.C. § 264(j) to confer federal jurisdiction over the FDIC. That section authorized the FDIC "to sue or be sued in any court of law or equity; State or Federal," and further provided that "all suits of a civil nature at common law or equity shall be deemed to arise under the law of the United States." This latter language clearly distinguishes the FDIC charter from the Red Cross charter. Thus the bank and FDIC charters are clearly distinguishable from the Red Cross charter both as to the language used and the context in which each was adopted.

Red Cross also contends that the legislative history of its charter shows an intent to confer federal jurisdiction on the Red Cross. The charter was amended in 1947 with the addition of the words "State or Federal" so that it reads "with the power to sue and be sued in courts of law and equity, *State or Federal,* within the jurisdiction of the United States." This change was urged by the Harriman Committee, a Red Cross advisory committee, and was derived in particular from Recommendation 22 of its report, which reads as follows:

> *Recommendation No. 22. The Charter should make it clear that the Red Cross can sue and be sued in the Federal Courts.*
>
> The present Charter gives the Red Cross the power 'to sue and be sued in courts of law and equity within the jurisdiction of the United States.' The Red Cross has in several instances sued in the federal Courts, and its powers in this respect have

> not been questioned. However, in view of the limited nature of the jurisdiction of the Federal Courts it seems desirable that this right be clearly stated in the Charter.

This language does not automatically confer original jurisdiction on federal courts. Rather it permits the Red Cross to sue and be sued in federal court if there is independent federal question jurisdiction or diversity jurisdiction. It is likely that the intent of the amendment was to make it clear that the Red Cross, a federally created corporation, could sue in diversity in federal court. *See Walton v. Howard University,* 683 F. Supp. 826, 829 (D.D.C. 1987).

Finally, as the First Circuit observed, Congress, prior to and during the time the Red Cross charter was adopted, was using explicit and specific language to confer federal jurisdiction over other federally created corporations. *See Federal Crop Insurance Corporation,* (7 U.S.C. § 1506) ("jurisdiction is hereby conferred upon such district courts to determine controversies"); *The Commodity Credit Corporation,* (15 U.S.C. § 714) ("the district courts of the United States shall have exclusive original jurisdiction . . . of all suits brought by and against the Corporation,") and *Federal Deposit Insurance Corporation,* (12 U.S.C. § 1819(b)(2)) ("all suits . . . to which the corporation is a party shall be deemed to arise under the laws of the United States"). No comparable language appears in the Red Cross charter and the conclusion is inescapable that Congress, by the language used in the Red Cross Charter, did not intend to confer original federal jurisdiction over actions involving the Red Cross.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted

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APPENDIX A — WRITS OF SUMMONS IN THE SUPERIOR COURT OF THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

WRIT OF SUMMONS

Susan Gladstone and Arthur Ellison
59 Rumford St.
Concord, NH 03301

v.

American Red Cross Blood Services
Vermont-New Hampshire Region, a Division of American Red Cross, a federally chartered non-profit association having a place of business at 425 Reservoir Ave., Manchester, NH 03105

To the Sheriff of any County or his Deputy

WE COMMAND YOU TO SUMMON the defendant, American Red Cross Blood Service Vermont-New Hampshire Region, a Division of American Red Cross

if to be found in your precinct, to appear at the SUPERIOR COURT at Concord in said County of Merrimack, on the first Tuesday of April 1990, to answer to Susan Gladstone and Arthur Ellison

IN A PLEA OF THE CASE for that on or about August 22, 1984 and prior thereto the defendant, American Red Cross Blood Services Vermont-New Hampshire Region, a Division of American Red Cross, was engaged in the business of acquiring

Appendix A

and selling blood and blood products to health care providers for transfusion to patients; that the defendant had a duty to screen blood donors to prevent persons in certain high risk groups from donating blood which the defendant knew or should have known involved risk of transmission of th H.I.V. virus to persons such as the plaintiff; the defendant was negligent in failing to properly screen blood donors and on or about August 1, 1984 procured blood from a donor who was infected with the H.I.V. virus; the infected blood was supplied to the Concord Hospital in Concord, New Hampshire and on August 22, 1984 transfused to the plaintiff; that as a result, the plaintiff became infected with the H.I.V. virus and currently is suffering from the Acquired Immune Deficiency Syndrome (A.I.D.S.) which has caused her loss of enjoyment of life, loss of probable life expency, extreme mental anguish and past, present and future pain and suffering, medical costs, loss of earning capacity and loss of wages, all to her damage, as she says, greatly in excess of the jurisdictional minimum requirements of the Superior Court, together with interest and costs.

Witness, Richard P. Dunfey, Esquire, the 2nd day of Mar. A.D. 1990

Susan Gladstone and Arthur Ellison
by their attorneys
UPTON, SANDERS & SMITH *Indorser*
By Gary B. Richardson
10 Centre St., Box 1109, Concord, NH 03302-1109

Marshall A. Buttrick
Clerk

Appendix A

THE STATE OF NEW HAMPSHIRE

RIMACK, SS. SUPERIOR COURT

WRIT OF SUMMONS

Susan Gladstone and Arthur Ellison
both of 59 Rumford Street
Condord, N.H. 03301

v.

Carol Leonard-McKinney, Administratrix of the Estate of Kenneth L. McKinney, Jr., M.D. of Hopkinton Rd., Hopkinton, N.H.

and

Kenneth L. McKinney, Jr., M.D. Professional Association, a professional association having a place of business at 33 Warren Street, Concord, N.H. 03301

To the Sheriff of any County or his Deputy

We Command You To Summon

if to be found in your precinct, to appear at the SUPERIOR COURT at Concord in said County of Merrimac, on the first Tuesday of April 1988, to answer to

COUNT I

In a plea of the case for that at all times relevant to this complaint Kenneth L. McKinney, M.D. (hereinafter "McKinney") was licensed to practice medicine in the State of New Hampshire,

held himself out as a specialist in the areas of obstetrics and gynecology, and acted as an employee, officer and director of Kenneth L. McKinney, Jr., M.D., Professional Association; that in August of 1984 the plaintiff, Susan Gladstone, employed McKinney to treat her for a fibroid tumor in her uterus and to perform a hysterectomy; that in endeavoring to perform said hysterectomy McKinney did not exercise the due care ordinarily exercised by other gynecologists in his profession in that he failed to adequately tie off the blood vessels to the uterus, failed to inform the plaintiff of the risks of such a procedure such as a contaminated blood transfusion and failed to take adequate precautions to avoid those risks; that as a proximate result, the plaintiff, Susan Gladstone, suffered severe abdominal bleeding which required a second operation and blood transfusions; that the blood received by Susan Gladstone was contaminated with the virus associated with Acquired Immune Deficiency Syndrome (A.I.D.S.) and Susan Gladstone has developed symptoms consistent with said disease; that as a further result, Susan Gladstone has suffered loss of enjoyment of life, loss of probable life expectancy, extreme mental anguish and past, present and future pain and suffering, medical costs, loss of earning capacity and loss of wages all to her damage as she says greatly in excess of the jurisdictional minimum requirements of the Superior Court together with interest and costs.

COUNT II

In a plea of the case for that Arthur Ellison is the husband of Susan Gladstone having been married to her on June 8, 1973 and they are the parents of two children, Jerome, age 11, and Anna, age 8; that as a result of the injuries sustained by Susan Gladstone, as alleged in Count I, Arthur Ellison has suffered the loss of the enjoyment of his wife's companionship, consortium and family relationship all to his damage as he says in excess of

the jurisdictional minimum requirements of the Superior Court together with interest and costs.

COUNT III

In a plea of the case for that the allegations of Counts I & II are realleged and incorporated by reference; that the plaintiffs did not become aware that Susan Gladstone had received contaminated blood until August of 1986; that between August of 1984 and August of 1986 the plaintiffs engaged in sexual intercourse; that as a result Arthur Ellison has been exposed to the A.I.D.S. virus although it has not yet been positively determined whether or not Arthur Ellison has contracted A.I.D.S.; however at the very least the exposure to A.I.D.S. has caused Arthur Ellison extreme mental anguish and emotional distress as approximate result of the defendant's negligence all to his damage as he says in excess of the jurisdictional minimum requirements of the Superior Court together with interest and costs.

Appendix A

THE STATE OF NEW HAMPSHIRE

MERRIMACK. SS. SUPERIOR COURT

WRIT OF SUMMONS

Susan Gladstone and Arthur Ellison
59 Rumford Street
Concord, NH 03301

Auto Suture Company, a Division of United States Surgical Corporation, a New York Corporation having a business address of 150 Glover Avenue, Norwalk, Conn. 06856

To the Sheriff of any County or his Deputy

We Command You To Summon

if to be found in your precinct, to appear at the SUPERIOR COURT at Concord in said County of Merrimack, on the first Tuesday of August 1988.

COUNT I — Products Liability

In a plea of the law for that on or about August 22, 1984 and prior thereto the defendant, Auto Suture Company, a division of United States Surgical Corporation, was engaged in the business of selling surgical staplers; that on said date a surgical stapler sold by the defendant was used by Kenneth L. McKinney, Jr., M.D. during a hysterectomy performed on the plaintiff, Susan Gladstone; that said stapler was in a defective condition unreasonably dangerous to the plaintiff Susan Gladstone in that the device failed to adequately ligate the blood vessels, the device

was sold without adequate warnings to the patient and instructions to the physician and the device was sold for use without ensuring that the physician using it had training in its use; that at the time of its use said stapler was without substantial change in the condition in which it was sold; that as such the defendant is legally responsible for the damages thereby caused; that as a result of the inadequate ligation of the blood vessels the plaintiff, Susan Gladstone, sufered severe abdominal bleeding which required a second operation and blood transfusions; that the blood received by Susan Gladstone was contaminated with the virus associated with Acquired Immune Deficiency Syndrome (A.I.D.S.) and Susan Gladstone has developed symptoms consistent with said disease; that as a further result, Susan Gladstone has suffered loss of enjoyment of life, loss of probable life expectancy, extreme mental anguish and past, present and future pain and suffering, medical costs, loss of earning capacity and loss of wages all to her damage as she says greatly in excess of the jurisdictional minimum requirements of the Superior Court together with interest and costs.

COUNT II — Negligence

In a plea of the case for the allegations of Count I are realleged and incorporated by reference; that the failure to give adequate warnings to the patient and instructions to the physician in the use of the surgical stapler and the failure to ensure that the physician using said device was trained in its use was negligent and violated a duty of ordinary care owed to the plaintiff, Susan Gladstone, suffered the damages described in Count I all to her damage as she says together with interest and costs in an amount greatly in excess of the jurisdictional minimum requirements of the Superior Court.

APPENDIX B — MOTION FOR STAY OF PROCEEDINGS DATED AUGUST 16, 1991

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW HAMPSHIRE

Civil Action
No. C.90-145-D

S.G. and A.E.,

Plaintiffs

v.

American National Red Cross (sued herein under the name "American Red-Cross Blood Services Vermont-New Hampshire Region, a Division of American Red Cross"),

Defendant

DEFENDANT'S MOTION FOR STAY OF PROCEEDINGS PENDING APPEAL TO UNITED STATES SUPREME COURT

The American National Red Cross ("Red Cross"), defendant, moves this Court for a stay of further proceedings in this case, to permit the Red Cross to petition the United States Supreme Court for a writ of certiorari to resolve what is now a split in United States Courts of Appeals as to whether the Red Cross's congressional charter confers original federal jurisdiction on actions involving the Red Cross. Unless such a stay is granted, the issue may be mooted by remand of the case to New Hampshire Superior Court, thereby depriving the Red Cross of the opportunity to present the issue to the United States Supreme Court. In support

of this Motion, the Red Cross states as follows:

1. On July 24, 1991, the United States Court of Appeals for the First Circuit reversed the ruling of this Court that 36 U.S.C. § 2 confers original federal jurisdiction on actions involving the Red Cross, a decision which is contrary to the decision reached by the United States Court of Appeals for the Eighth Circuit. Compare *S.G. & A.E. v. American National Red Cross*, No. 90-1873 (1st Cir., July 24, 1991) with *Kaiser v. Memorial Blood Center*, No. 89-5533 (8th Cir., April 10, 1991). In addition, the First Circuit remanded *S.G. & A.E.* to this Court to determine whether joinder of nondiverse parties is appropriate so as to destroy diversity, the other basis for federal jurisdiction, and thus require remand to the state court. *S.G. & A.E.*, slip op. at 2, 19.

2. The Red Cross moved the First Circuit for a stay of its mandate pursuant to Federal Rule of Appellate Procedure 41 to assure that the Red Cross would have time to petition the Supreme Court for a writ of certiorari. Appellee's Motion for stay of Mandate, August 9, 1991 (attached). On August 13, 1991, the First Circuit declined to enter a stay, apparently because the matter was being remanded to this Court for further proceedings on the issue of joinder and diversity, and because the Red Cross would have the opportunity to seek a stay of such further proceedings from this Court.

3. Because this Court has previously announced how it would resolve the joinder and diversity issues (Order of June 19, 1990 at 4, modifying Order of May 24, 1991), the Red Cross is concerned that without a stay of proceedings, this Court may immediately resolve the diversity issue and remand the action to state court. Such a remand to state court would foreclose the Red Cross from appealing the charter issue to the United States

Supreme Court, because an order to remand is unappealable under the circumstances of this case. See 28 U.S.C. § 1447(d).

4. At a minimum, the Red Cross believes the joinder and remand issue should be briefed in light of the Supreme Court's recent decision, *Freeport-McMoRan, Inc. et al. v. K.N. Energy, Inc.*, 111 S. Ct. 858, 860 (Feb. 19, 1991), which holds that "[d]iversity jurisdiction, once established, is not defeated by the addition of a nondiverse party to the action." Although *Freeport-McMoRan* does not deal specifically with removal issues under 28 U.S.C. § 1447(e), the court does cite with approval an earlier Supreme Court decision which held that jurisdiction is not "defeated by the intervention, by leave of court, of a party whose presence is not *essential* to a decision of the controversy between the original parties . . . ." (Emphasis added.) Accordingly, it would appear that 28 U.S.C. § 1447(e) is not to be applied to permit joinder and remand except where the party to be joined is indispensable. This construction is also consistent with the legislative history of 1447(e), which provides that "[j]oinder coupled with remand may be more attractive than either dismissal under Civil Rule 19(b) or denial of joinder." H.R. REP. No. 889, 100th Cong., 2d Sess. 72-73, *reprinted in* 1988 U.S. Code Cong. & Ad. News, 5982, 6033. (Rule 19(d) deals specifically with indispensable parties.)

5. The Red Cross represents to this Court that it is in the process of preparing a petition for certiorari to the Supreme Court and intends to file the petition promptly, so that the Supreme Court will have the opportunity to decide whether to grant the petition within this calendar year.

6. As this Court held in its Order of June 19, 1990, the issue of whether the Red Cross charter confers original federal

jurisdiction to permit removal is "one of those 'rare cases' which cry out" for appellate resolution. Moreover, the First Circuit recognized "the importance of the jurisdictional issue presented, especially in light of the increasing litigation concerning the transmission of HIV virus through the transfusion of tainted blood." *S.G. & A.E.*, slip op. at 1. While reaching a conclusion different from that of the Eighth Circuit, the First Circuit acknowledged that "[t]his is not to say that the question whether Congress intended to convert all Red Cross cases into federal question cases when it amended the Red Cross Charter is easily decided." *Id.* at 18.

7. Numerous courts throughout the country are continuing to face this jurisdictional issue, and they continue to reach divergent decisions. It would be especially regrettable if Supreme Court review were to be frustrated by remand of the action to state court before the Supreme Court could be given the opportunity to determine the issue definitively.

WHEREFORE, the American National Red Cross respectfully moves this Court to stay further proceedings in the case to permit the Red Cross to file a timely petition in the United States Supreme Court for a writ of certiorari and to permit the Supreme Court to take appropriate action on the petition. In the event this Court is not inclined to stay proceedings, the Red Cross moves, in the alternative, for seven days' advance notice to permit it to seek emergency relief from the Supreme Court. Alternative proposed Orders are attached.

The Red Cross has made a good faith attempt, pursuant to Local Rule 11(c), to obtain concurrence of the plaintiffs in the relief sought by this Motion, but has been unable to obtain such concurrence. As the present Motion is addressed to the Court's

discretion, no memorandum with citations of supporting authorities is being submitted.

AMERICAN NATIONAL RED CROSS
By Its Attorneys,
SULLOWAY HOLLIS & SODEN

By s/Irvin Gordon
Irvin D. Gordon (0962)
9 Capitol Street
Concord, NH 03302-1256
(603) 224-2341

DATE: August 16, 1991

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE DATED SEPTEMBER 24, 1991

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Civil No. 90-145-D

Susan Gladstone;
Arthur Ellison

v.

American National Red Cross

ORDER

On July 24, 1991, the Court of Appeals, acting on interlocutory appeal, reversed and remanded with respect to this court's order of May 24, 1990. Document no. 10. *S.G. & A.E. v. American Nat'l Red Cross*, No. 90-1873 (1st Cir. July 24, 1991) In such order, this court had held that 36 U.S.C. § 2 vested exclusive jurisdiction in actions to which American Red Cross ("Red Cross") is a party in federal courts. The mandate of the court of appeals issued on August 21, 1991.[1]

In the interim, however, Red Cross moved the court for a stay of proceedings pending a petition for certiorari to the Supreme Court of the United States. Document no. 23. Alternatively, Red Cross sought a stay by this court of seven days to allow it to

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1. The mandate was here received on August 22, 1991.

apply to a justice of the Supreme Court for such relief.[2]

Simultaneously, plaintiffs filed their second motion to join parties and remand this matter to state court. Document no. 24.

Under the provisions of 28 U.S.C. § 2101(f), a stay pending an application for certiorari to the Supreme Court "may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court . . . ." The courts which have considered this statute have ruled that it vests authority to grant a stay in the court of appeals or a justice of the Supreme Court. *In re Stumes*, 681 F.2d 524, 525 (8th Cir. 1982); *Gander v. FMC Corp.*, 733 F. Supp. 1346, 1347 (E.D. Mo. 1990) (and cases therein cited). The district court is without jurisdiction to grant a stay of execution of its judgment pending a defendant's application for certiorari. *Id.* Red Cross has moved for a stay from the court of appeals, but this motion has been denied. Inasmuch as this court lacks jurisdiction to grant the relief of a stay, the motion of Red Cross seeking such relief must also be and is herewith denied.

With respect to the plaintiffs' second motion, it is true that, were it not for the jurisdictional issues raised by 36 U.S.C. § 2, this court had previously ruled, upon balancing the requisite factors, that it would grant joinder and order remand. Document no. 10, at 4-6. The court perceives no changes in circumstances which require it to reconsider such ruling, and, accordingly, it

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2. The proposed petition for certiorari is grounded on a dispute between circuits. As noted in *S.G. & A.E. v. American Nat'l Red Cross, supra*, slip op. at 5, 6, the Eighth Circuit has held that the "sue and be sued" language in 36 U.S.C. § 2 vests original federal jurisdiction over Red Cross. *See Kaiser v. Memorial Blood Center*, No. 89-5533 (8th Cir. Apr. 10, 1991).

herewith grants the second motion for joinder and remand. Accordingly, pursuant to the mandate of the court of appeals, joinder of parties is granted, and this case is herewith remanded to the Superior Court of Merrimack County, New Hampshire.

SO ORDERED.

s/ Shane Devine
Chief Judge
United States District Court

September 24, 1991

cc: Gary B. Richardson, Esq.
Irvin D. Gordon, Esq.
Bruce M. Chadwick, Esq.

APPENDIX D—SLIP OPINION IN *WALKER V. AMERICAN NATIONAL RED CROSS* DATED AUGUST 16, 1991

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 91-0749
Judge George H. Revercomb

BESSIE WALKER, Personal Representative of the estate of TANYA M. TAYLOR,

Plaintiff,

v.

AMERICAN NATIONAL RED CROSS, et al.,

Defendants.

MEMORANDUM AND ORDER

The plaintiff, Bessie Walker, alleges that the decedent, Tanya Taylor, contracted Acquired Immune Deficiency Syndrome ("AIDS") as the result of receiving a blood transfusion that was contaminated with the human immundeficiency virus ("HIV"). The plaintiff alleges that the defendant, the American National Red Cross, was negligent in its testing and screening of blood received by Ms. Taylor. The plaintiff filed suit in the Superior Court of the District of Columbia on March 1, 1990 and the American Red Cross filed a notice of removal in this court on April 10, 1991.

The plaintiff filed a motion to remand the case to the Superior Court, the defendant filed an opposition as well as a supplement

to its opposition, and argument was heard on the motion on May 10, 1991.

Under the removal statute, 28 U.S.C. § 1441(a), this case would be properly removed to this Court if it would have original jurisdiction over the action. The defendant argues that the Red Cross Charter, 36 U.S.C. § 2 (1988) confers federal jurisdiction in all cases involving the Red Cross. 36 U.S.C. § 2 states that the Red Cross shall have "the power to sue and be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States . . ." The plaintiff argues that this language does not create original jurisdiction, but is merely a grant of corporate power.

The courts have been split on this issue of whether Congress intended that 36 U.S.C. § 2 create original jurisdiction in the federal courts. Judges Penn and Harold Greene of this Court have held that 36 U.S.C. § 2 does not confer original jurisdiction in the federal courts for actions to which the Red Cross is a party.[1] On the other hand, the United States Court of Appeals for the Eighth Circuit, in the first appellate decision addressing this issue, held that the clause does grant federal jurisdiction. *Kaiser v. Memorial Blood Center,* No. 89-5533, slip op. (8th Cir. Apr. 11, 1991).[2]

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1. *See Walton v. Howard University,* 638 F. Supp. 826 (D.D.C. 1987); *Okoro v. Children's Hospital,* No. 87-2114 (D.D.C. July 12, 1988); *Ray v. American National Red Cross,* Civil Action No. 90-1882, slip op. (D.D.C. Oct. 19, 1990); *Boutar v. American National Red Cross and American Red Cross,* Civil Action No. 90-3155, slip op. (D.D.C. April 9, 1991).

2. In addition, both parties have cited numerous cases that support their positions. The courts are almost evenly split on this issue.

Appendix D

The Supreme Court has considered whether sue and be sued language confers federal jurisdiction. In *Bank of the United States v. Deveaux*, 9 U.S. 61 (1809), the Supreme Court held that the language "sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in courts of record, or any other place whatsoever . . ." was insufficient to create federal jurisdiction. In *Osborn v. Bank of the United States*, 22 U.S. 738, 817 (1824), the Supreme Court held that the language "to sue and be sued, . . . in all state courts having competent jurisdiction, and in any circuit court of the United States" explicitly granted jurisdiction in the circuit courts to hear any case in which the bank was a party. The Court stated that "general words, which are usual in all acts of incorporation, gave only a general capacity to sue, not a particular privilege to sue in the courts of the United States." *Id.* Continuing this rationale in *Bankers Trust Co. v. Texas and Pac. Ry.*, 241 U.S. 295 (1916), the Court found that the statute, which stated "shall be able to sue and be sued . . . in all courts of law and equity within the United States," did not intend to confer jurisdiction upon any court.

In 1942, the Supreme Court in *D'Oench, Duhme & Co. v. Federal Deposit Insurance Corp.*, 315 U.S. 447 (1942), allowed the F.D.I.C. to sue in federal court pursuant to the corporation's charter, 12 U.S.C. § 1829. The defendants argue that the language in this charter, "sue or be sued in any court of law or equity, State or Federal," is almost identical to the language in the Red Cross charter. However, the F.D.I.C. charter contains subsequent language, referenced by the Supreme Court in *D'Oench*, 315 U.S. at 455, which expressly confers federal jurisdiction on the F.D.I.C. 12 U.S.C. § 1819 (1935) provided:

> "To sue and be sued, complain and defend, in any court of law or equity, State or Federal. All

> suits of a civil nature at common law or in equity to which the Corporation shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, without regard to the amount in controversy; and the Corporation may . . remove any such action, suit, or proceeding from a State court to the United States district court.'"[3]

It is this subsequent language that creates the right to removal to federal court of actions against the F.D.I.C.[4] Thus, it is obvious that Congress knew how to create original jurisdiction in the F.D.I.C. in 1935. Yet, Congress did not specifically include this type of language in the Red Cross charter's amendment in 1947. Absent similar language specifically conferring federal jurisdiction upon the Red Cross, the Court finds that 36 U.S.C. § 2 was merely a grant of corporate authority and not an explicit creation of federal jurisdiction.

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3. 12 U.S.C. § 1819 presently reads:

> (b)(2)(A) . . . all suits of a civil nature at common law or in equity to which the Corporation, in any capacity, is a party shall be deemed to arise under the laws of the United States.
>
> (b)(2)(B) . . the Corporation may . . . remove any action, suit, or proceeding from a State court to the appropriate United States district court.

Section D of the statute specifies actions in which the FDIC would not have federal jurisdiction.

4. *See Jeanne, et al. v. The Hawkes Hospital of Mt. Carmel, et al.*, No. C-2-87-509 (S.C. Ohio 1988).

Appendix D

The defendants argue that the subsequent language in the F.D.I.C. charter was not necessary to confer jurisdiction and that the language used in *Osborn* should be considered to be the minimum language required. However, the Court finds that the language used in the Red Cross charter does not even meet the minimum requirements of *Osborn*. At the time the charter in *Osborn* was written, circuit courts of the United States were the federal courts of original jurisdiction and the charter stated that the bank shall be able to sue and be sued "in any circuit court of the United States." Unlike the charter in *Osborn*, the Red Cross charter does not specify that the Red Cross shall be able to sue or be sued in federal courts of original jurisdiction. If the Court interpreted the Red Cross charter as the defendant suggests it should, the Red Cross would also be permitted to sue or be sued in the Supreme Court, a Circuit Court of Appeals, or the Claims Court, which are federal courts of law and equity.[5] The Court refuses to adopt this interpretation.

The defendant also urges the Court to rely on legislative history that it asserts supports a finding that 36 U.S.C. § 2 confers federal jurisdiction. Specifically, the defendant cites to a report by a Red Cross advisory committee, the "Harriman Committee." S. Rep. No. 38, 80th Cong., 1st Sess. 1 (1947); H.R. Rep. No. 337, 80th Cong., 1st Sess. 6 (1947). However, contrary to the defendant's assertion, Recommendation No. 22 does not make clear that the purpose of the clause was to confer original jurisdiction upon the Red Cross solely as a result of this statute. Instead, the recommendation simply reiterates the power of the Red Cross as a corporation to sue and be sued, similar to any other litigant, in the federal courts if federal jurisdiction applies,

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5. *See Boutar v. American Red Cross*, No. 90-3155 (D.D.C. April 9, 1991).

such as in the instance of diversity or the presence of a federal question.

In addition, as pointed out by the court in *Walton v. Howard University,* 683 F. Supp. 826, 829 (D.D.C. 1987), the Senate hearing on the charter amendments does not indicate that the committee intended to grant original federal jurisdiction for suits involving the Red Cross. *See American National Red Cross: Hearing on S. 591 Before the Senate Comm. on Foreign Relations,* 80th Cong., 1st Sess. 7-11 (1947). Instead, the discussion centered on the issue of whether the provision actually limited the corporate powers of the Red Cross by not giving it the ability to litigate in foreign courts.

Based upon the foregoing reasons, the Court finds that 36 U.S.C. § 2 is merely a grant of corporate power. It does not explicitly confer federal jurisdiction upon the Red Cross as is required under *Osborn.* At the time the amendment was added, Congress was well aware of the subsequent language referred to in *D'Oench,* which explicitly conferred federal jurisdiction upon the F.D.I.C. Congress chose not to use this language. Therefore, this Court agrees with Judge Penn and Judge Harold Greene that original jurisdiction is not conferred on the Red Cross by means of its charter. The opinion from the United States Court of Appeals for the Eighth Circuit, *Kaiser v. Memorial Blood Center, supra,* which does not state the reasons for its conclusions, does not persuade this Court otherwise.

it is therefore ORDERED that the Motion to Remand is GRANTED.

Dated: May 10, 1991

Appendix D

s/ George H. Revercomb
George H. Revercomb
United States District Judge